

Approved 11/4/14



Town of Duxbury

Conservation Commission

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DUXBURY, MASS.

Minutes of September 23, 2014

The Conservation Commission met on Tuesday, September 23, 2014 at 7:00 PM in the Mural Room at the Duxbury Town Hall.

Members Present: Joe Messina, Chair; Sam Butcher; Dianne Hearn; Barbara Kelley; Holly Morris; Corey Wisneski

Members Absent: Tom Gill

Staff Present: Joe Grady, Conservation Administrator; Susan Ossoff, Administrative Assistant

The meeting was called to order by Chairman Joe Messina at 7:03 PM. This is a continuation of SE 18-1653, 685 Washington Street.

Chairman Messina said that the order of the meeting will be: the applicant will continue his presentation, there will be questions from the Commissioners, and there will be time for comments from the public. Paul Driscoll, counsel for the applicant, asked that people that are in attendance to speak in favor of the project be allowed time to speak.

Attorney Driscoll said he wished to bring up a serious matter. In Documents 236 and 237, he believes there are materials that were obtained by illegal trespass on the McLaughlin property. No permission has been granted for access to the property. He stated that the attached photos in Document 236 are taken from the McLaughlin site, and the bulk of the material was obtained by trespass. Document 237 contains photos also taken on the site. Attorney Driscoll said the law in Massachusetts for trespass applies to the person who goes on the property and the person who directs them to do so. Between now and the next meeting, he wants to find out who went on the property. If his accusations are substantiated, he will move to strike the experts report and PowerPoint information obtained through trespass. Mr. Driscoll said he will follow up on this issue and will decide on a course of action before November.

Joe Messina noted the objection for the record to submissions 236 and 237 and will consult with Special Counsel about it, but this hearing is not the forum for resolving the trespass issue. Mr. Driscoll responded that this was a reasonable approach. They anticipate their presentation will go until 9:30-10:00. Mr. Messina mentioned that he had at the last hearing told Mr. McGregor, representing the Friends of the Bluefish, that there would be time for their presentation tonight but that he had notified them previous to the meeting that it likely would be put off until a different night.

Paul Brogna, engineer for the applicant, began the continuation of his presentation. He clarified that the plan he will be discussing is the plan dated September 8, 2014. The float has been relocated on this plan. He then referred the Committee's attention to the 'Distances Spreadsheet' and reviewed its contents. He reviewed the locations of other piers at various addresses and discussed their relationship to the salt marsh and other design similarities to the proposed McLaughlin pier. These piers included piers at: 74 Captain's Hill Road, 34 Elderberry

878 Tremont Street, Duxbury, MA 02332; Telephone: 781-934-1100 x 5471; Fax: 781-934-1137

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Road, 27 Elderberry Road, 89 Hornbeam Road, 307 Bay Road, and 90 Marshall Street. He said the salt marsh erosion is due to natural processes.

Mr. Brogna said that the only thing different about the proposed McLaughlin pier from the others is the address.

Sam Butcher asked if it is Mr. Brogna's position that the proposed pier is in a tidal creek. Mr. Brogna responded that whether it is in a tidal creek or a tidal flat, the design works for either location. Mr. Butcher then asked about Sheet 1 of 9 of the plans, where it has the word 'tidal creek' and 'tidal flat' and asked if that is a delineation line. Mr. Brogna said it was taken from the DEP map of the Commission's consultant report. Mr. Butcher then asked to confirm that it is a scaled version of the DEP map and Mr. Brogna said it was.

Sam Butcher then asked about the float stops. He suggested the pile elevations are not accurate because the piles terminate at elevation 5 or 6. He thought they would need to be higher. Mr. Brogna said that Mr. Butcher was correct, and the next plan will show the higher height. Mr. Butcher suggested the piles might have to go to about elevation 13.

Sam Butcher asked if the most recent plan includes power and water; Mr. Brogna said that it does; these will be provided through conduit. Mr. Butcher asked if the muck samples previously presented to the Commission in 4 jars were collected with ASTM methods, and Mr. Brogna said they were not. Mr. Butcher asked if any sediment analysis was done on these samples, and whether there was chain of custody documentation, and Mr. Brogna said no analysis was done and there was no chain of custody documentation.

The next presenter for the applicant was wetlands scientist Bob Gray of Sabbatia. He discussed wetland resource areas and clarified that he has never said that a tidal creek is not part of a salt marsh. He commented that the last report from the Commission's consultant was dated February 18, and in the absence of follow-up or direction from the Commission as to what type of float is preferred, they have had to proceed with two float designs. It is his professional opinion that it is impossible to have a tidal creek and a tidal flat overlap because the tidal flat is part of a coastal beach; there is no definition of a tidal flat in a salt marsh. At the pier site there is no coastal beach, so there is not in his opinion a tidal flat, but he will proceed as if there is in the absence of consensus about this.

He reviewed the dimensions of the proposed pier and said it met all the regulations and the Commission's requirement that it be as small as possible. The float size, platform, and walkway are smaller than allowed. He discussed the definition of 'adverse effect' as being a greater than negligible change in a resource area.

He discussed the two possible designs for the float – float stop and skid. He said Duxbury prefers the skid design, though many other towns use the float stop design. He stated that the Commission 'has to help the design along' and this is why he has asked for input about the design so he can take one of the designs out of play.

Mr. Gray then discussed salt marshes and performance standards. They have tried to minimize the number of piles which normally are 10 feet on center by designing for 12 feet on center with 1 wire handrail that will be almost invisible. They have minimized adverse impacts in the design of the piles, decking, and railing.

Holly Morris asked Mr. Gray to expand on the cumulative effects of piers on the Bluefish River. There are 24 other piers in the Bluefish. She also asked about the amount of marsh to be displaced by the pilings and float stop for this pier, and whether 100-200 square feet of total marsh is displaced by all the piers.

Bob Gray said those calculations could be done, but this project involves a 12.95 square foot loss of marsh due to the piles, and he questions if that is an adverse effect. He said there are 146,749 square feet of salt marsh, and 12.95 square feet is 0.0088% which is in his opinion negligible. Holly Morris said she was asking about cumulative effect, and Mr. Gray replied that even 1000 square feet would be negligible given the total area of the marsh.

Holly Morris said the McLaughlin pier is a total of 605 square feet. With 24 piers in the system that is 7500 to 10,000 square feet of salt marsh affected by the cumulative system of piers, and she wanted to know the cumulative effects of this on the marsh.

Bob Gray said that when approvals were provided for the other piers, the Commission had to have decided that there were no adverse effects. In his opinion, it isn't possible to say that the other projects that the Commission decided had no adverse effects could cumulatively be determined to have an adverse impact.

Mr. Gray addressed the float, and said he believes the Commission will say the use of Figure 3 in the Horsley Witten report is inappropriate. The applicant has reoriented the float to provide a greater distance from the edge of the salt marsh. He described the float stop mechanism and the skid design.

Mr. Gray addressed land containing shellfish. He stated that this area is land containing shellfish, but that George Hampson can cite specific findings and can attest to the poor quality of the habitat for shellfish. Both float designs have negligible effects and the proof is that this Commission has approved similar designs in land containing shellfish for other projects.

Mr. Gray talked about tidal flats. He said the only reason this resource area is in play is because of Figure 3 in the Horsley Witten report that says this. The regulatory definition is that a tidal flat is part of a coastal beach, and there is no beach at the site of this project. However until the Commission says that the Horsley Witten report is wrong, the applicant has to prove they meet those standards. Mr. Gray talked about the coastal bank which is a 4' high retaining wall for which there are no performance standards.

Corey Wisneski asked about the regulation that no more than one pier is permitted on any residential property. Mr. Gray said that the other pier at the property passes over the McLaughlin property but landward it is on the other person's property and the float is in the river. There is a deed between the parties allowing air rights to allow the crossing of upland over the McLaughlin property.

Sam Butcher said that as he recalls, beyond the salt marsh there is no mud flat. There was a discussion about whether there can be a tidal flat seaward of a salt marsh.

Sam Butcher said that in his August letter, Mr. Gray uses the term 'guzzle' synonymously with 'tidal creek.' Mr. Gray said the Commission used the word guzzle, and that all can recognize that the guzzle is not unique – it is a tidal creek with a salt marsh. Mr. Gray said in defining areas, the regulations must be used. Mr. Butcher said that the Duxbury regulations don't define the term tidal creek so other guidance documents have to be used. Mr. Butcher asked if it is Mr. Gray's

opinion that the float is within a tidal creek. Mr. Gray's response was that it may be. Sam Butcher asked if Mr. Gray agreed that in the absence of a definition, one would use the "Guide to Coastal Wetland Regulations" when defining resource areas as a tidal creek, and asked what Mr. Gray used for his definition; Mr. Gray said that he did indeed use that Guide.

Sam Butcher asked if the float will be 'high and dry' 10-12 hours each day, and Mr. Gray confirmed that it would be. Mr. Butcher asked if Mr. Gray thought the Commission was obligated to permit any project but minimize the adverse impacts; Mr. Gray said that the Commission must fairly review within the context of the regulations; there should not be a predetermined fate. The Commission should be open, hear information, plans and reports in the context of the regulations. Whether or not the Commission likes the project should have no bearing in regulatory review and the members should make the best judgment as to whether the project meets performance standards.

Sam Butcher asked Mr. Gray about Item 6 in his July 14, 2014 letter, where he states that the pier complies because it reaches beyond the salt marsh in less than 200 feet. Mr. Butcher asked if in Mr. Gray's opinion, if that is not achieved if the pier does not then comply. Mr. Gray replied that it does meet the 'vegetated' salt marsh in the Duxbury regulations; these regulations do not say 'salt marsh.' The regulations don't say that if the pier ends in the tidal creek area of the salt marsh it is prohibited.

Sam Butcher asked about Mr. Gray's March letter which describes the types of boats that will be at the pier, identifying a small boat or dinghy. He asked Mr. Gray if he thought the Commission can write Orders of Conditions that limit what can be at the pier. Mr. Gray said it would be unprecedented in the Town of Duxbury to do that, but if the Commission's concerns can only be addressed that way, then they would need to spell out why Mr. McLaughlin's boat is different than elsewhere in the Town and have that condition. He continued to say that anything can go in the Order of Conditions, but hopefully they are legal things that can withstand a court challenge. Regarding boat usage, perhaps it would be useful to ask the applicant if he can live with this restriction.

Sam Butcher asked about the density of sediment, and whether in terms of pounds per square inch of exerted force, the skid float would be safe if it exerts 60 psi or whether it can sink and become unsafe. Mr. Gray said the skid design has been used in similar substrates and that should not be a problem or concern.

Mr. Brogna asked if some public input could be heard; Mr. Hampson and Mr. O'Connell next will do their presentations.

Tom Cataldo, of 30 Spring Street commented that Mr. McLaughlin bought the property and has renovated the house as promised. He has property rights like the other 25 pier owners in the area. He wanted to know why this pier is so different, and why there have been so many meetings and this hearing has continued so long.

Bob Bonner of Oceanwoods Drive agreed with Mr. Cataldo that this process has gone on far too long. The letter from the Rural and Historical Society said the pier was allowed and it is a question of property rights. The Town will pay the costs should this be appealed. He asked if there are other piers approved in the Bluefish area recently and Mr. Messina said no. Mr. Brogna said the two newest piers were put in over 15 years ago. Mr. Bonner asked when the Conservation Commission last denied a pier; Joe Messina said it would be the previous application for this pier. Mr. Bonner asked about the costs to the Town of having Special

Counsel attend the meetings and of the hired consultants. Joe Messina said the applicant objected to Town Counsel resulting in the need to hire Special Counsel. Joe Grady said the reason for the many hearings is that the Commission has been given over 2000 pages of materials from the applicant and the Friends of the Bluefish; none of this was requested by the Commission. The applicant choose to bring in the multiple experts that are presenting, and the Commission is allowing them to present what they want and will continue to do so for as many continuations of the hearing as they need.

Mike Quinlan of Park Street said he favors allowing the pier to be built because he agrees that property rights as sacred, although he hasn't heard the other side. There are over 20 piers in Town that are similarly situated, and this case is entitled to equal protection, and this process could get expensive.

Bill Tenhoor, former Chairman of the PASS Committee is concerned about the number of piers. He said there are private property rights, but also shared rights in the intertidal area for the public, and these are in conflict. He is concerned at the rapid rate at which piers are being built and how it affects users of the waterfront. There are important aesthetic values and they are important. In rewriting the regulations they tried to consider everyone's interests. He believes there will be impacts from this pier and suggested alternatives such as a shared pier provision with the other pier that crosses the property. The public interest in this area is 'profound.'

Marie Lee said there are 2 issues to be considered. The first is whether the pier complies with the regulations, and the answer to this is yes. The second is whether the Commission wants to change the regulations – if so, they should go ahead – but it doesn't affect this project; this pier meets the present regulations.

Mark Stearns of Oceanwoods Drive agreed with Ms. Lee. He thinks docks and piers are beautiful, that people are in favor of this application, and that there has been a negative letter writing campaign with misinformation.

John Britton of Upland Road said his concern is with the money the Town is spending. He is a property owner rights proponent but a pier is beyond a question of what can be done to a house, there are aesthetics important to Duxbury. This is one of the last public areas where it is possible to look out and see the salt marsh and the water. Property owner rights end when there are impacts on the public.

Leslie Lawrence of Summer Street, a member of the Duxbury Historical Commission, said they were asked by the Army Corps of Engineers for an opinion of the aesthetic effects of putting a pier on an iconic salt marsh. She noted that this is an open space district, part of the National Shipbuilder's District, and a historic property. The Historic Commission felt the pier interfered with the view, and were very opposed to the project and noted so in their first letter to the Army Corps. They were recently asked again by the Army Corps for an opinion of the pier application. They reiterated more strongly their opposition. They believe this is the most beautiful view in Duxbury. What was there before was not a pier, it was a walkway for loading and unloading cargo.

Elizabeth Loring, the only direct abutter to the 685 Washington Street location, said this pier cannot get to open water in 200 feet. The tidal creek or guzzle is not open water, and she never saw a pier that goes straight and then takes a 90 degree angle turn to get to the water. She wondered if the regulations require a straight pier. The aesthetic issue will come into play particularly at the ZBA level. This hearing is the first in many steps of a long process.

Joe Messina clarified that the view and aesthetics are protected interests under the bylaws, although it is hard to have identifiable aesthetic standards. Aesthetics are more a zoning issue and less important to the Commission.

Ruth Cataldo of 30 Spring Street said she loves looking out at docks and that they are aesthetically wonderful.

Attorney Driscoll asked if there was anyone else who will be away in November that wants to speak.

Syd Balsbaugh of Cove Street said Bill Ellison gave the property to the Rural and Historical Society so that it would remain wild, and that his wishes are not being carried out. He thinks the intent of the original owner is important and should be considered.

Bob Mytkwicz of Surrey Lane said the applicant should be allowed to do what he can do under the current regulations.

Bob Murphy of West Street mentioned that people leave dinghies on the marsh. Joe Messina said they are not supposed to do that and that the enforcement of that falls to the Harbormaster who can bring an enforcement order. The Commission does not want people leaving stuff on the marsh. Mr. Murphy said people also should not walk on the marsh.

Jean Clarke of Surplus Street said the pier will ruin an iconic view and can disrupt migratory birds. She believes there is a higher good than individual property rights, and that if you buy public property there is a higher obligation to the Town of Duxbury.

Joe Messina reminded everyone that the hearing will be continued until November 18. Reviewing time needs, Mr. Driscoll thought that Mr. Hampson would need approximately 30 minutes and Mr. O'Connell approximately 40 minutes to do their presentations.

Mr. Gray asked if they will have written comments from Horsley Witten by the next meeting. Joe Grady said there are large volumes of material that keep getting submitted, and wondered if there was a point at which the final materials would be in. Mr. Gray said it was 'unconscionable' that the only input from Horsley Witten was the February 18 letter.

Paul Driscoll wanted to confirm that they will have a chance to respond to comments, and stated that the hearing will go beyond November. The next continuation date will be discussed on November 18.

Mr. Messina asked the Friends of the Bluefish how long they expected their presentation to take and was told approximately an hour.

On a motion by Corey Wisneski, seconded by Holly Morris, it was unanimously voted 6-0-0 to continue the hearing for SE18-1653 until November 18 at 7:00 PM.

Adjournment: On a motion by Holly Morris, seconded by Sam Butcher, it was unanimously voted 6-0-0 to adjourn the meeting at 10:05 PM.

MATERIALS REVIEWED AT THE MEETING

SE 18-1653 NOI application and related submitted materials